

Annual Report

2004
2005
2006
2007
2008
2009

Copyright Board of Canada



Copyright Board
Canada



Commission du droit d'auteur
Canada

The Honourable Jim Prentice, P.C., M.P.
Minister of Industry
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the nineteenth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2007.

Yours sincerely,

A handwritten signature in black ink, appearing to read "S. Callary".

Stephen J. Callary
Vice-Chairman and
Chief Executive Officer

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• Board • Members and Staff

2004
2005
2006

as of March 31, 2007

Chairman: The Honourable Justice William J. Vancise

*Vice-Chairman and
Chief Executive Officer:* Stephen J. Callary

Members: Francine Bertrand-Venne
Sylvie Charron

Secretary General: Claude Majeau

General Counsel: Mario Bouchard

*Director of Research
and Analysis:* Gilles McDougall

*Economic
Research Analyst:* Dave Rhéaume

Senior Clerk of the Board: Lise St-Cyr

*Manager,
Corporate Services:* Ivy Lai

Registry Officers: Nadia Campanella
Tina Lusignan

*Financial and
Administrative Assistant:* Joanne Touchette

Administrative Assistant: Manon Huneault

Informatics Officer: Michel Gauthier

2007
2008
2009



• Chairman's Message •

I am pleased to present the 2006-2007 Annual Report of the Copyright Board of Canada. This report describes the Board's activities during the year in the discharge of its responsibility under the *Copyright Act* to set royalties that are fair and equitable to rights owners and to users of copyright-protected works.

The Board held two hearings in 2006-2007. The first, which lasted ten days in September 2006, examined the tariff proposed by CMRRA/SODRAC Inc. (CSI) for the reproduction of musical works by online music services for the years 2005-2007. The other, held in October 2006, was on Private Copying for the years 2005-2007. At the end of the reporting period, the decision on Private Copying was still under advisement.

In 2006-2007, the Board issued eleven decisions. Four of them established royalties to be paid to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) under Tariff 19 (Fitness Activities and Dance Instruction) for the years 1996-2006, Tariff 15.A (Background Music) for the year 2005, Tariff 23 (Hotel and Motel In-Room Services) for the years 2001-2006, Tariff 24 (Ringtones) for the years 2003-2005. Another dealt with royalties to be paid to the Neighbouring Rights Collective of Canada (NRCC) under Tariff 3 (Use and Supply of Background Music) for the years 2003-2009 and another reinstated, on an interim basis, the SOCAN-NRCC 2003-2007 tariff for commercial radio stations, pending its re-examination by the Board further to an order by the Federal Court of Appeal. Finally, on November 30, 2006, the Board ruled on an application filed by Standard Radio Inc. regarding the "Regulations Defining Advertising Revenues".

Two decisions dealt with royalties to be paid to CSI for the reproduction of musical works; one by commercial radio stations for the year 2007 and the other by online music services for the years 2005-2007. Another decision established royalties to be collected by the Educational Rights Collective of Canada (ERCC) from educational institutions in Canada for the reproduction and performance of works or other subject-matters communicated to the public by telecommunications for the years 2007-2011. Finally, the Board issued a decision setting the levy to be paid, on an interim basis, for the private copying of sound recordings of musical works for the year 2007.

All of the foregoing decisions are described in greater detail in the present report.

As for unlocatable copyright owners, 21 licences were issued by the Board for the use of published works for which rights holders could not be found; the nature of works varied from architectural plans to literary and artistic works.

In 2006-2007, the Board also initiated procedures leading to hearings to be held later in 2007 and early 2008. One will re-examine the SOCAN-NRCC Commercial Radio tariff, as per the order of the Federal Court of Appeal. Another will jointly examine tariffs filed by SOCAN, NRCC and CSI targeting subscription radio services, and the last will deal with SOCAN Tariff 16 targeting background music suppliers for the year 2007.

During 2006-2007, the Board hosted a number of foreign delegations, namely, a delegation from the UK Patent Office commissioned to review the mandate of the UK Copyright Tribunal; the Chairman of the UK Copyright Tribunal; a Japanese copyright delegation; and the Asia-Pacific Regional Office of the International Confederation

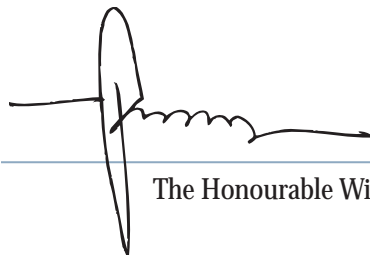


of Societies of Authors and Composers (CISAC), who was accompanied by a delegation from the Taiwan Copyright Office. Board Members and staff also held a day long briefing session with Judges of the U.S. Copyright Royalty Board in Washington, and also attended a number of national and international fora of copyright specialists.

Finally, I was invited to speak at two events during the year. The first, a seminar sponsored by the Intellectual Property Institute of Canada and McGill University in Toronto on August 23, 2006, where I spoke about the changes that had occurred at the Copyright Board during the ten years since the adoption of Bill C-32. The second was the annual convention of the Canadian Association of Broadcasters held in Vancouver on November 5, 2006. This was a business session for the broadcasters with the Copyright Board, and included Mr. Claude Majeau, Secretary General, Mr. Mario Bouchard, General Counsel and Mr. Gilles McDougall, Director of Research and Analysis. My speech was aimed at dispelling some misconceptions about the role of the Board, the way it functions and the way it treats copyright users in general, and broadcasters in particular.

Last year, the Board lost the services of Member Brigitte Doucet whose 5-year term ended in November 2006. Ms. Doucet was a valued colleague who contributed greatly to the work of the Board. Her careful and thoughtful approach to the matters before the Board will be missed. On behalf of the Copyright Board, I wish to thank Ms. Doucet for her dedicated service.


The year 2006-2007 was a very productive period for the Board and I would like to thank my colleagues on the Board as well as the personnel for their support and assistance. The Board is fortunate to have dedicated and expert support staff without whom we could not do our job. Their expertise, work ethic and determination to work together make the work of the Board possible.



The Honourable William J. Vancise



*The Board is fortunate
to have dedicated and expert
support staff without whom
we could not do our job.*

A professional studio microphone with a silver mesh grille is mounted on a black shock mount. The microphone is positioned in the center of the frame. The background is a blurred studio environment with various pieces of equipment and a bright light source on the right. The entire image has a blue color overlay.

**The Board
is an economic
regulatory body...**



• Mandate of the Board •

The Copyright Board of Canada was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue licences when the copyright owner cannot be located and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter.

The *Copyright Act* (the “Act”) requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a licence.

The Board’s specific responsibilities under the *Act* are to:

- certify tariffs for the public performance or the communication to the public by telecommunication of musical works and sound recordings [sections 67 to 69];
- certify tariffs, at the option of a collective society referred to in section 70.1, for the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the *Act* [sections 70.1 to 70.191];
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions [sections 70.2 to 70.4];
- certify tariffs for the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes [sections 71 to 76];
- set levies for the private copying of recorded musical works [sections 79 to 88];
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located [section 77];

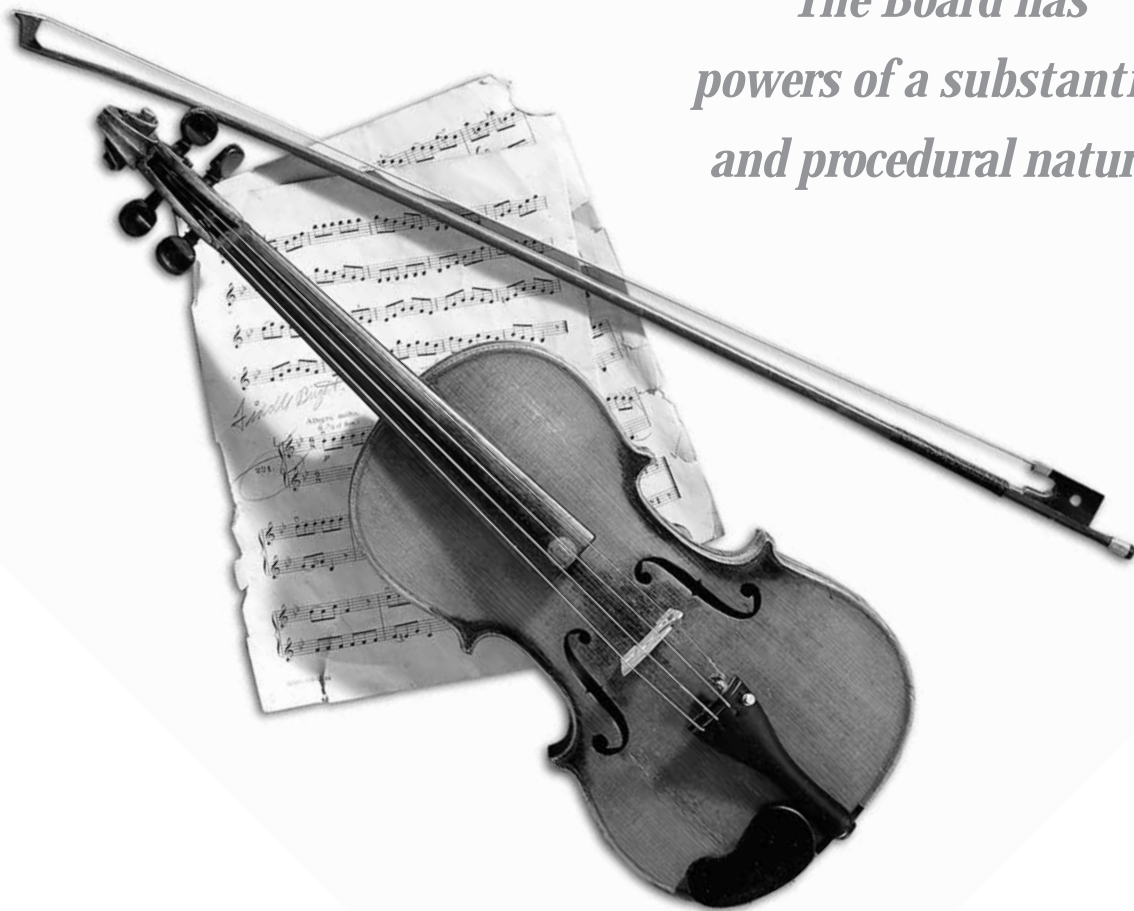


- examine, at the request of the Commissioner of Competition appointed under the *Competition Act*, agreements made between a collective society and a user which have been filed with the Board, where the Commissioner considers that the agreement is contrary to the public interest [sections 70.5 and 70.6];
- set compensation, under certain circumstances, for formerly unprotected acts in countries that later join the Berne Convention, the Universal Convention or the Agreement establishing the World Trade Organization [section 78].

In addition, the Minister of Industry can direct the Board to conduct studies with respect to the exercise of its powers [section 66.8].

Finally, any party to a licence agreement with a collective society can file the agreement with the Board within 15 days of its conclusion, thereby avoiding certain provisions of the *Competition Act* [section 70.5].

*The Board has
powers of a substantive
and procedural nature.*





• Operating Environment •

Historical Overview

Copyright collective societies were introduced to Canada in 1925 when PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *Copyright Act* was amended in several respects. The need to register copyright assignments was abolished. Instead, CPRS had to deposit a list of all works comprising its repertoire and file tariffs with the Minister. If the Minister thought the society was acting against the public interest, he could trigger an inquiry into the activities of CPRS. Following such an inquiry, Cabinet was authorized to set the fees the society would charge.

Inquiries were held in 1932 and 1935. The second inquiry recommended the establishment of a tribunal to review, on a continuing basis and before they were effective, public performance tariffs. In 1936, the *Act* was amended to set up the Copyright Appeal Board.

On February 1, 1989, the Copyright Board of Canada took over from the Copyright Appeal Board. The regime for public performance of music was continued, with a few minor modifications. The new Board also assumed jurisdiction in two new areas: the collective administration of rights other than the performing rights of musical works and the licensing of uses of published works whose owners cannot be located. Later the same year, the *Canada-US Free Trade Implementation Act* vested the Board with the power to set and apportion royalties for the newly created compulsory licensing scheme for works retransmitted on distant radio and television signals.

Bill C-32 (An Act to amend the *Copyright Act*) which received Royal Assent on April 25, 1997, modified the mandate of the Board by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers of the sound recordings (“the neighbouring rights”), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings (“the home-taping regime”) and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes (“the educational rights”).

General Powers of the Board

The Board has powers of a substantive and procedural nature. Some powers are granted to the Board expressly in the *Act* and some are implicitly recognized by the courts.

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small user that would otherwise incur large costs. The hearing may be dispensed with on certain preliminary or interim issues. No hearings have been held yet for a request to use a work whose owner cannot be located. This process has been kept simple. Information is obtained either in writing or through telephone calls.



The examination process is always the same. The collective society must file a statement of proposed royalties which the Board publishes in the *Canada Gazette*. Tariffs always come into effect on January 1. On or before the preceding 31st of March, the collective society must file a proposed statement of royalties. The users targeted by the proposal (or in the case of private copying, any interested person) or their representatives may object to the statement within sixty days of its publication. The collective society in question and the opponents will have the opportunity to argue their case in a hearing before the Board. After deliberations, the Board certifies the tariff, publishes it in the *Canada Gazette* and explains the reasons for its decision in writing.

Guidelines and Principles Influencing the Board's Decisions

The decisions the Board makes are constrained in several respects. These constraints come from sources external to the Board: the law, regulations and judicial pronouncements. Others are self-imposed, in the form of guiding principles that can be found in the Board's decisions.

Court decisions also provide a large part of the framework within which the Board operates. Most decisions focus on issues of procedure, or apply the general principles of administrative decision-making to the specific circumstances of the Board. However, the courts have also set out several substantive principles for the Board to follow or that determine the ambit of the Board's mandate or discretion.

The Board also enjoys a fair amount of discretion, especially in areas of fact or policy. In making decisions, the Board itself has used various principles or concepts. Strictly speaking, these principles are not binding on the Board. They can be challenged by anyone at anytime. Indeed, the Board would illegally fetter its discretion if it considered itself bound by its previous decisions. However, these principles do offer guidance to both the Board and those who appear before it. In fact, they are essential to ensuring a desirable amount of consistency in decision-making.

Among those factors, the following seem to be the most prevalent: the coherence between the various elements of the public performance of music tariffs, the practicality aspects, the ease of administration to avoid tariff structures that make it difficult to administer the tariff in a given market, the search for non-discriminatory practices, the relative use of protected works, the taking into account of Canadian circumstances, the stability in the setting of tariffs that minimizes disruption to users, as well as the comparisons with "proxy" markets and comparisons with similar prices in foreign markets.



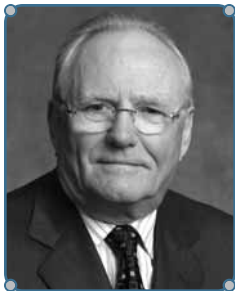
• Organization of the Board •

Board members are appointed by the Governor in Council to hold office during good behaviour for a term not exceeding five years. They may be reappointed once.

The *Act* states that the Chairman must be a judge, either sitting or retired, of a superior, county or district court. The Chairman directs the work of the Board and apportions its caseload among the members.

The *Act* also designates the Vice-Chairman as Chief Executive Officer of the Board, exercising direction over the Board and supervision of its staff.

Chairman



The Honourable William J. Vancise, a justice of the Court of Appeal for Saskatchewan, was appointed part-time Chairman of the Board for a five-year term commencing in May 2004. Mr. Justice Vancise was appointed to the Court of Queen’s Bench in 1982 and to the Court of Appeal for Saskatchewan in November 1983 where he continues to serve. In 1996, he was appointed Deputy Judge of the Supreme Court of the Northwest Territories. Mr. Justice Vancise earned an LL.B. from the University of Saskatchewan in 1960 and was called to the Saskatchewan Bar in 1961. He joined Balfour and Balfour as an associate in 1961 and in 1963 he was named a partner at Balfour, McLeod, McDonald, Laschuk and Kyle, where he became the managing partner in 1972. Mr. Justice Vancise received his Queen’s Counsel designation in 1979.

Vice-Chairman & Chief Executive Officer



Stephen J. Callary is a full-time member appointed in May 1999 and reappointed in 2004 for a five-year term. Mr. Callary has served as Managing Director of consulting firms, RES International and IPR International; as Executive Director of TIMEC – the Technology Institute for Medical Devices for Canada; and as President of Hemo-Stat Limited and Sotech Projects Limited. He has extensive international experience dealing with technology transfer, software copyrights and patents and the licensing of intellectual property rights. From 1976 to 1980, Mr. Callary worked with the Canadian Radio-television and Telecommunications Commission (CRTC), the Privy Council Office (PCO) and the Federal-Provincial Relations Office (FPRO). He has a B.A. degree from the University of Montreal (Loyola College) and a B.C.L. degree from McGill University. He was admitted to the Quebec Bar in 1973 and pursued studies towards a Dr.jur. degree in Private International Law at the University of Cologne in Germany.

Members



Francine Bertrand-Venne is a full-time member appointed in June 2004 for a five-year term. Prior to her appointment, Ms. Bertrand-Venne was General Manager of the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ). She was also SPACQ's legal counsel for labour relations under the federal and Quebec status of the artist acts, the *Copyright Act* and the *Broadcasting Act*. Ms. Bertrand-Venne is a graduate of the University of Sherbrooke (LL.B. in 1972). She is a member of the Council of Canadian Administrative Tribunals, the *Association littéraire et artistique internationale* (ALAI Canada) and the *Association des juristes pour l'avancement de la vie artistique* (AJAVA).



Sylvie Charron is a full-time member appointed in May 1999 and reappointed in 2004 for a five-year term. Before joining the Copyright Board, she was an Assistant Professor with the University of Ottawa's Faculty of Law (French Common Law Section) and worked as a private consultant in broadcasting, telecommunications and copyright law. Prior to her law studies, she worked for the Canadian Radio-television and Telecommunications Commission for 15 years. Ms. Charron is a graduate of the University of Ottawa (B.Sc. Biology in 1974, M.B.A. in 1981, LL.B. in 1992, and LL.L in 2005). Ms. Charron is a member of the Canadian Association of Law Teachers, of the Association des juristes d'expression française de l'Ontario (AJEFO), of the Council of Canadian Administrative Tribunals and is former Vice-Chair of the Ottawa Chapter of Canadian Women in Communications and past Executive Director of the Council of Canadian Law Deans.

Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2007-2008 (Part III of the Estimates) and the Performance Report for 2006-2007. These documents are or will soon be available on the Board's Web site (www.cb-cda.gc.ca).



• Public Performance of Music •

Background

The provisions under sections 67 onwards of the *Act* apply to the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television or the Internet. Collective societies collect royalties from users based on the tariffs approved by the Board.

Filing of Tariff Proposals

On March 30, 2007, SOCAN and NRCC filed their respective statement of proposed royalties to be collected in 2008; some tariffs cover more than one year. NRCC filed two new proposals: Tariff 5 for the use of music to accompany live events and Tariff 6 for the use of music to accompany dance and fitness. These two new tariffs are for the years 2008 to 2012.

Hearings

No hearing was held in 2006-2007.

Decisions

In 2006-2007, the Board issued seven decisions dealing with public performance of music.

Decision rendered April 21, 2006 – SOCAN Tariff 19 (Fitness Activities and Dance Instruction) 1996-2006

Tariff 19 of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) sets royalties for the use of SOCAN's repertoire in conjunction with fitness activities or dance instruction. The tariff proposals for the years 1996 to 2001 provided for an annual fee per room of \$2.14 multiplied by the average number of participants each week in the room, with a minimum fee of \$64. Those rates were the same as those certified by the Board for 1995. SOCAN then proposed increases for 2002-2006 to account for inflation; these requests were later abandoned in favour of maintaining the 1995 rate through to 2006. The proposal also provided for the addition of an explicit reference to dance instruction.

The process leading to the certification of these tariffs was long. Various individuals and organizations objected. SOCAN entered into negotiations and in 1998, after agreements were reached and objections were withdrawn, the only remaining objectors were the Canadian Dance Teachers' Association and the British Association of Teachers of Dancing – Maritimes Provinces. SOCAN then asked the Board to settle the matter. The Board asked the objectors for written submissions. Deadlines were pushed back; further negotiations took place. By January 2003, negotiations



had again failed and the Board was asked to establish a schedule leading to the certification of the tariff. Not long after a new written examination process was put into motion, both objectors informed the Board that they did not plan to proceed any further.

The Board thus found itself with a proposed tariff that no one appeared to object to, but for which it seemed difficult, if not impossible, to obtain information. The objectors had raised several issues that were apparently relevant, but the Board could not rule on them without additional evidence. In July 2003, the Board offered the objectors the opportunity to participate in a very streamlined process. It received no replies.

As a result, the Board was forced to proceed based on the record as it stood. Without enough reliable evidence to enable the Board to make any kind of change to the proposed tariff, the questions raised by the objectors as to how different levels of usage of SOCAN's repertoire by different types of users should affect the tariff rates would have to remain unanswered. Therefore, the Board certified the same rates for the period 1996 to 2006 that it certified in 1995, that is \$2.14 per room multiplied by the average number of participants each week in the room, subject to a minimum annual fee of \$64.

In order to remove any uncertainty as to the actual ambit of the tariff, the Board reinstated an explicit reference to dance instruction that had been removed in 1988. The wording of the tariff was also adjusted to reflect the language used in the Board's most recent tariffs.

Finally, the Board discussed the role of private agreements. In the general regime, the *Act* provides that agreements take precedence over tariffs. In the SOCAN regime, the issue is not addressed. Agreements seem inconsistent with this regime as the *Act* does not appear to contemplate the existence of a parallel market for music performing rights. If agreements run against a certified tariff, the tariff can lose its meaning. Yet, agreements can be useful for setting terms and conditions that correspond to actual uses and can help avoid long and costly debates. This leaves several questions. Is the market fragmentation created by private agreements a bad thing or a sign of market adaptation? Is there a need to ensure that users with practices similar to those of individuals who have entered into an agreement have access to the same conditions and, if so, how can this be achieved? The Board continues to consider the place of private agreements under the SOCAN regime.

Decision rendered June 2, 2006 – SOCAN Tariff 15.A (Background Music) 2005

SOCAN Tariff 15.A sets royalties for the performance of background music by means of recorded music in establishments who do not use the services of a background music supplier. For 2005, SOCAN proposed the same tariff as the one the Board had approved for 2004. A number of objectors opposed the proposed tariff. In the end, only the Retail Music Association of Canada (RMAC) took part in the hearing held on November 1, 2005; others either withdrew or abandoned their objections.

RMAC argued that the performance of background music in its members' stores is aimed at stimulating sales of sound recordings and that the Board must take into account this increased benefit for SOCAN members by reducing the amount of royalties accordingly. RMAC suggested that this should result in record stores paying half of the proposed royalty. RMAC arrived at this figure by assessing the promotional value of the music played, in the portion of an average record store dedicated to the sale of CDs (half), at 75 per cent of the total value of background music, while it valued the music played in the other half of the store at 25 per cent.



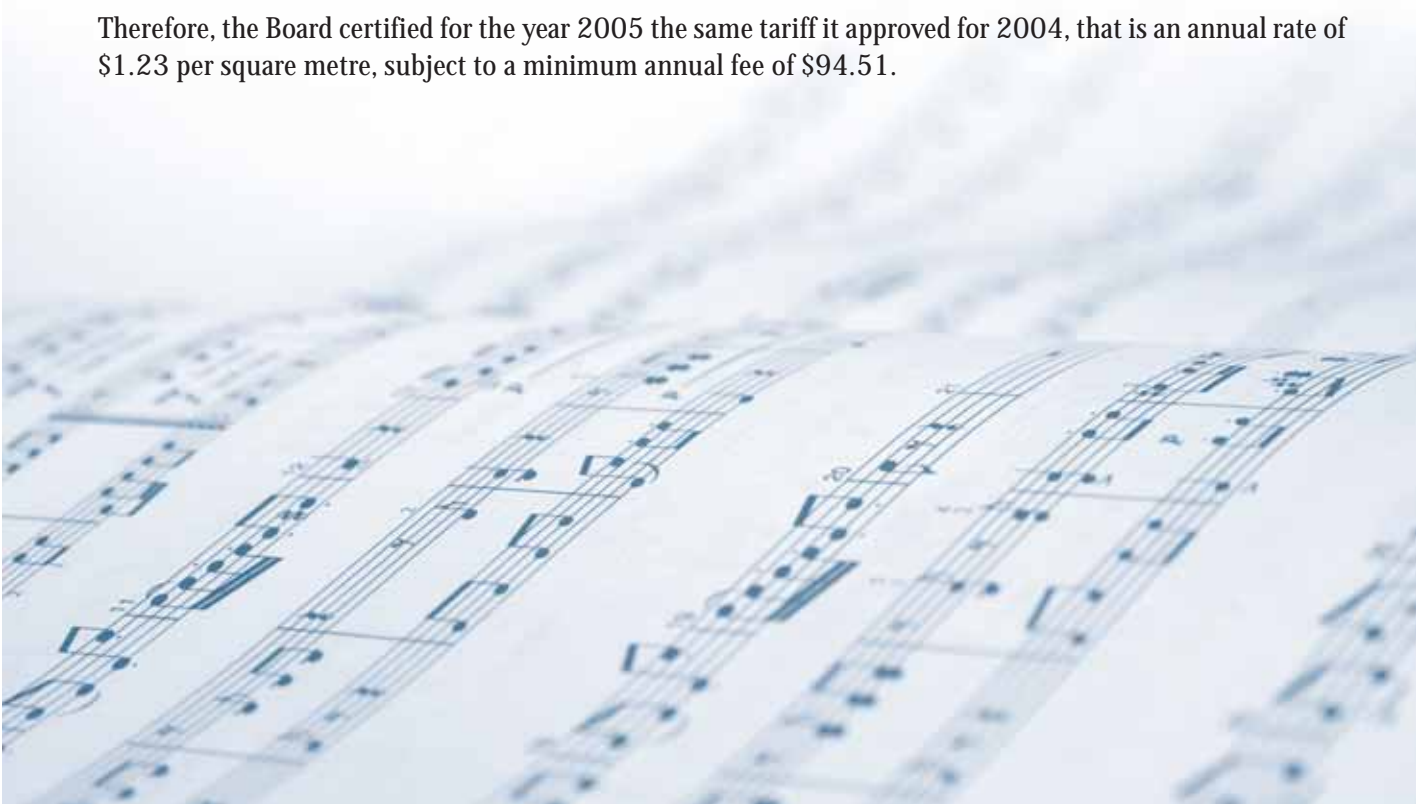
To support its claim, RMAC relied on a survey carried out primarily with clients of HMV's website; a report prepared by a lawyer specializing in the field of music, that dealt with the promotional value of background music and examined the discounts contained in other SOCAN tariffs; a series of layout plans for certain record stores, illustrating – among other things – the relative importance of CD and DVD displays; and excerpts from an annual survey on the reasons for the respondents' most recent CD purchase. RMAC also called witnesses attesting to the importance of the relationship between the sound recording industry and music stores as well as the important role played by background music in selling CDs in record stores.

The Board rejected RMAC's arguments for three reasons. First, the evidence submitted was insufficient to establish that the use of SOCAN's repertoire contributed significantly to the sale of sound recordings of these same works. Second, the Board did not believe the promotional value associated with the use of musical works should result in a discount. Third, the sums involved were so modest that ability to pay was not an issue.

The Board found that RMAC's evidence did not include information on its reliability and that the testimony was anecdotal. The Board also agreed with SOCAN's argument that CD sales generate remuneration in connection with reproduction rights whereas this tariff targets performing rights. These rights are protected separately and independently; a variation in the royalties paid in connection with one type of rights should not generate a variation in the royalties paid in connection with the other type of rights. Moreover, the Board has always refused to discount a tariff to take into account the contribution of a group of users to the music industry. In the end, the Board saw no reason why record stores should pay less than others for the background music they use.

The Board also considered the ability of record stores to pay the royalties asked of them. It estimated the average annual royalty per store to be about \$290. The Board did not believe that payment of these royalties by record stores would have a serious impact on their bottom line.

Therefore, the Board certified for the year 2005 the same tariff it approved for 2004, that is an annual rate of \$1.23 per square metre, subject to a minimum annual fee of \$94.51.





Decision rendered June 30, 2006 – SOCAN Tariff 23 (Hotel and Motel In-Rooms Services) 2001-2006

In their room, hotel guests can access a variety of audio-visual and musical content. That content uses music that is protected by copyright. SOCAN Tariff 23 is a new tariff that sets the royalties for the use of music as part of in-room services.

Many objected to the proposed tariffs, namely, among others, the Canadian Cable Telecommunications Association (CCTA), the Hotel Association of Canada (HAC), On Command Canada Inc. (OCC) and LodgeNet Entertainment (Canada) Corporation (LodgeNet). OCC and LodgeNet both provide lodging establishments with in-room services targeted by the tariff, as well as Instant Media Network (IMN), a subsidiary of OCC that packages and offers in-room musical services.

OCC and LodgeNet act as carriers for audio-visual services and for the IMN pay music service. They operate the delivery system in lodging establishments and deliver IMN's musical content to individual guest rooms. For this, IMN pays a carriage fee. Hotels and motels receive access fees from their guests; they hold them in trust for remittance to the carriers, in exchange for a commission. IMN receives only a portion of the retail fee charged by the establishment, after paying a commission to the establishment and deducting carriage fees charged by OCC and LodgeNet.

Shortly before the hearing, the parties reached an agreement on the audio-visual part of the tariff. SOCAN had sought to emulate Tariff 17. The parties agreed on rates increasing from 1.05 per cent in 2001 to 1.25 per cent in 2005 and 2006, of the fees paid by the guests to view audio-visual content other than mature audience films; for mature audience films that use SOCAN's repertoire, the rates were to start at 0.2625 per cent in 2001, to progressively increase to 0.3125 per cent in 2005 and 2006. The agreed-upon structure recognized the special circumstances of the industry under review and its differences with non-broadcast services. The different rate for mature audience films was meant to reflect the relative amount of protected music used. The Board accepted the proposal with one variation. Since it is possible for film producers to clear rights for music that is in SOCAN's repertoire otherwise than through SOCAN, the tariff does not apply to mature audience films for which a SOCAN licence is not required, even if the music is in SOCAN's repertoire. For 2004, the Board estimated the royalties payable on this portion of the tariff to be around \$250,000.

With respect to the musical part of the tariff, the parties disagreed over the rate base and the rate. SOCAN asked that royalties be calculated on the amount paid by the lodging establishment to its provider of musical services, net of hotel commissions. The Board agreed with the service providers that the rate base should be the payments they make to IMN. This would more accurately mirror the pay audio services tariff, where the rate base is the affiliation payments received by services from broadcast distribution undertakings. The role of common carrier in this instance is more readily ascribed to the service providers than to the hotel operator.

SOCAN also claimed that the programming offered by IMN is virtually identical to that of services covered by the pay audio services tariff and that the Board should base its valuation on that tariff. It proposed a rate of 12.35 per cent; IMN suggested 5 per cent. The Board identified some notable differences between pay audio services and IMN. Pay audio services offer highly focussed programming; IMN is programmed randomly. Music is packaged differently. Marketing and pricing structures are different. While the IMN service theoretically could be worth as much and even more than the pay audio services, its discretionary nature and the fact that it is a nascent business militated for a lower rate. Therefore, the Board set the tariff at 5 per cent for 2001 and 2002 and 5.5 per cent for 2003 to 2006.



CCTA wanted the tariff to clearly provide that cable services in hotel rooms are already covered under SOCAN Tariff 17. This was achieved through proper tariff wording. For its part, HAC submitted that lodging establishments are simply an intermediary who should not be liable for the tariff. The Board opted to avoid the issue not stating who is liable. SOCAN can collect royalties from anyone who is liable either for the communication to the public by telecommunication, or the authorization of the communication in providing the services.

Decision rendered August 18, 2006 – SOCAN Tariff 24 (Ringtones) 2003-2005

SOCAN filed in April 2002, its first proposed tariff for the communication of musical works incorporated into telephone or other ringtones, for 2003 to 2005. For 2003, it proposed a rate of 10 per cent of the ringtone supplier's revenues to a maximum of \$7,500 per calendar quarter. For 2004, it proposed a rate of 10 per cent of the supplier's revenues subject to a minimum royalty of 10¢ for each ringtone supplied. For 2005, it proposed a rate of 10 per cent of the supplier's revenues subject to a minimum royalty of 20¢ per ringtone supplied. SOCAN arrived at the rate by relying on the approach used by the Board for pay audio services.

Bell Mobility, the Canadian Wireless Telecommunications Association and Telus Mobility (collectively the "Wireless Carriers") objected to one or more of the proposed statements, as did the Canadian Recording Industry Association.

The objectors contended that the communication of a ringtone is not a public communication but a private transaction between a vendor and a purchaser and as such, should not be protected by copyright.

The objectors submitted that if liability did exist, the rate should be no more than 1.5 per cent of the ringtone supplier's revenues. They contended that SOCAN's analysis was based on an incorrect reading of the Board's decision for pay audio services and that SOCAN's proposed tariff was inconsistent with comparable tariffs around the world. In their view, a ringtone transaction primarily engaged the reproduction right. The communication is purely incidental or accessory, and the tariff needed to reflect this. The objectors also asked that the effective rate applicable to mastertones be lower than that for synthesized ringtones.

The Board concluded that a musical ringtone constitutes a substantial part of a musical work since, in the alternative, there would be little or no incentive for the consumer to purchase it. The Board also concluded that such a communication was "to the public" because the music files were made available on the Internet openly and without concealment, with the knowledge and intent that the files would be conveyed to all who might have access to it.

The Board rejected SOCAN's proxy but kept the methodology that consists in setting the royalty rate for the communication of musical ringtones by making a comparison with the rate for the reproduction right for those same ringtones. Accordingly, the Board first determined that the average rate payable for the reproduction of musical works under Canadian commercial agreements that were entered in evidence is 12 per cent.

The Board then determined the communication to reproduction ratio by reference to the tariffs for commercial radio stations, where a one-to-three ratio exists for the right the Board considers as ancillary. However, even though, unlike the reproduction right, the communication right is ancillary and optional in the ringtone market, its use is nonetheless very profitable. It allows the use of an instantaneous electronic delivery technology that greatly facilitates the transaction and at the same time makes it more accessible and less expensive. The Board thus established the value of the communication right at half that of the reproduction right. This ratio applied to the 12 per cent average reproduction rate, led to a rate of 6 per cent.



The Board also concluded that although part of the added value of mastertones is attributable to producers and performers, part of it is also attributable to authors and composers. The Board therefore concluded that the applicable rate and rate base would be the same for mastertones and synthesized ringtones.

In addition, the Board certified a minimum royalty of 6¢ per ringtone, which is equal to the royalty that applies to a ringtone sold for \$1. This minimum royalty was approved for 2004 and 2005 only, since SOCAN had not asked for minimum royalties for 2003.

Decision rendered October 20, 2006 – NRCC Tariff 3 (Background Music) 2003-2009

In April 2002, the Neighbouring Rights Collective of Canada (NRCC) filed a tariff proposal for the performance in public and the communication to the public by telecommunication of published sound recordings of musical works as background music for the years 2003 to 2009.

NRCC asked for a single tariff with two rate structures or categories. Category A targets those who supply background music to commercial and industrial establishments. Under this category, background music suppliers would pay 11.2 per cent of the gross amount they receive from their subscribers, net of any amount paid by the supplier to acquire equipment allowing the subscriber to receive the background music service.

Category B targets individual establishments that provide their own background music. Under this category, establishments that provide their own music would pay a specific dollar amount calculated according to one of three possible methods. The first method is the number of admissions, attendees, or tickets sold multiplied by 0.26¢. If this method cannot be used, the second, corresponding to the number of people allowed in the public space (typically according to fire or liquor control regulations) multiplied by the number of days of background music use multiplied by 0.52¢, must be used. If neither the first nor second method applies, the third method is the area of the public space multiplied by the number of days of background music use multiplied by 0.867¢ per square metre (or 0.081¢ per square foot). When none of the methods can be used, the user is charged \$94.08 per year. NRCC was not asking for any minimum royalty.

A number of background music suppliers, users and their representatives objected to the proposed tariff. Principal among the suppliers was the Canadian Cable Telecommunications Association. Bell ExpressVu, Star Choice Television Network Inc. and CHUM Satellite Services also filed objections. The Hotel Association of Canada (HAC), the Canadian Restaurant and Food Services Association (CRFA) and the Alberta Association of Agricultural Societies filed objections as representatives of users.





Objectors proposed royalty rates of 1.7 per cent for industrial premises and of 2.7 per cent for non-industrial premises. These rates were based on SOCAN Tariff 16 which targets background music suppliers.

CRFA and HAC initially took the position that NRCC should get nothing given that their members were already paying SOCAN a royalty pursuant to its Tariff 16. They contended that having to pay additional royalties to NRCC would have a significant impact on their members' business. They nevertheless conceded that their members would have to pay a royalty but stressed that it ought to be minimal.

The Board agreed with NRCC to certify a single tariff for most background uses. The integrated structure NRCC proposed was simpler and also had the merit of minimizing the risk of vertical inconsistency among the collective's tariffs.

The Board used SOCAN Tariff 16 as the starting point since it is a similar right in a similar market, it has been in place for a long time and it is a blanket licence.

SOCAN Tariff 16 sets a lower rate for industrial than other premises. The Board does not believe that such a difference can be justified in the current instance. Businesses purchase background music to help them make money. In the industrial establishment, the objective is to increase productivity. Elsewhere, the objective is to increase sales. In addition, the Board believes that the market can account for the lower value of the service by setting a lower price, which is reflected automatically in lower royalties when, as here, those are set at a percentage of the price of the service.

The Board thus used as the starting point the non-industrial component of SOCAN Tariff 16, or 7.5 per cent of the amount paid by the subscriber to the background music supplier, net of equipment cost. Since the Board concluded that 43.06 per cent of background music was in NRCC's repertoire, the rate to be paid when a supplier provides the background music was set at 3.2 per cent (7.5×0.4306) of the subscription fees.

In order to establish the rate with respect to establishments that provide their own background music, the Board converted the rate of 3.2 per cent into a rate expressed as dollars multiplied by some other factor (attendance, capacity or area).

Thus, for the years 2003 to 2005, the Board certified rates of 0.08¢ per admission, 0.15¢ per unit of capacity per day or 0.25¢ per square meter (0.023¢ per square feet) per day. The royalty was set at \$26.88 per year when none of the above methods applies.

For 2006, following the Board's application of a rule for inflationary adjustment, the rates increased to 0.0831¢ per admission, 0.1558¢ per unit of capacity per day or 0.2597¢ per square meter (0.0239¢ per square feet) per day. The royalty was set at \$27.92 per year when none of the above methodologies applies. For 2007 to 2009, the rates remain subject to the same inflationary adjustment rule.

The inflationary adjustment rule used by the Board corresponds to the annual percentage variation in the consumer price index, minus one percentage point. Because this is a multi-year tariff spanning over 7 years, the Board wanted to embody such adjustment rule into the tariff. This allows for a quick adjustment to inflation, and can become an encouragement for collectives to submit multi-year tariff proposals.



The tariff provides that NRCC can proceed with an inflationary adjustment to its rates expressed in dollars under four conditions. First, the adjustment to be applied shall be higher than three percentage points. If, for any 12-month period, the adjustment is lower than 3 percentage points, the rates will remain unchanged but the adjustment will be cumulated to the next 12-month period adjustment. Second, NRCC shall send a notice of the change to the affected background music users. Third, NRCC shall notify the Board of the change, including the detailed calculation of the increase. Fourth, NRCC shall post that calculation on its website.

Interim decision rendered November 24, 2006 – SOCAN-NRCC Tariffs 1.A (Commercial Radio Stations) 2003-2007

Until December 2002, most commercial radio stations paid 3.2 per cent of their gross income to SOCAN and 1.44 per cent of their advertising revenues to NRCC. Stations using SOCAN's repertoire for less than 20 per cent of their broadcast time paid 1.4 and 0.64 per cent respectively. All talk stations paid NRCC \$100 per month. On October 14, 2005, the Board certified the *SOCAN-NRCC Commercial Radio Tariff, 2003-2007*. For SOCAN, the rates were 3.2 per cent on a station's first \$1.25 million of revenues in a year, and 4.4 per cent on the excess; the rate for low-use stations increased to 1.5 per cent. For NRCC, the rates became 1.44 per cent, 2.1 per cent and 0.75 per cent. The decision allowed stations to pay additional amounts owed for past periods free of interest over two years.

The Board justified the increase in the rates on three grounds. Music had been historically undervalued, radio now played more music, and music allowed radio to derive efficiencies they should share with composers. The Canadian Association of Broadcasters (CAB) challenged the Board's decision before the Federal Court of Appeal. On October 19, 2006, the Court found that the reasons given to justify the amount of the first and third increases were insufficient, set aside the Board's decision and remitted the matter to "redetermine the issues in respect of which the reasons have been found to be inadequate."

As a result of the Court's decision, the 2002 rates were reinstated on an interim basis. On October 26, 2006, SOCAN and NRCC applied for an interim tariff that would maintain the provisions of the October 2005 Tariff. They offered three arguments supporting the motion. First, the Court had questioned the adequacy of the reasons for the increase but not the quantum. Second, CAB itself had conceded that the evidence rationally supported the Board's decision to increase the rate and only challenged the adequacy of the reasons. Third, reverting to the 2002 rates would require complex calculations to determine excess payments made to date, when further calculations would have to be made once the final tariff has been set.

CAB opposed the application on three grounds. First, there was no need for an interim decision; subsection 68.2(3) of the *Copyright Act* already provides that the previous tariff automatically applies on an interim basis. Second, the October 2005 Tariff was a legal nullity and as such, could not be used as a basis for setting an interim tariff. Third, if the Board wished to set an interim tariff, it should simply restate what was already in place by virtue of subsection 68.2(3) of the *Act*, bearing in mind that the collectives have the burden of persuading the Board that the interim rate should change the *status quo*.

The Board granted the application in part. It applied the principles governing interim orders as set out by the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*. First, while the *Act* provides a mechanism whereby a certified tariff that has expired continues to apply on an interim basis, that cannot be determinative. By refusing to issue an interim decision on that sole basis, the Board would fetter



its discretion. Second, the *status quo* was no longer a reasonable option. Substantial changes would necessarily be made to the pre-2003 tariff, had already been put in effect and should be maintained. Third, additional recalculations would have deleterious effects. They would be complex, costly, not final and would create deadweight loss. Fourth, even though the October 2005 Tariff was a nullity in its entirety, the Board was not required to reconsider the matter *de novo*. The order of the Federal Court of Appeal remitted the matter to the Board to re-determine “the issues in respect of which the reasons have been found to be inadequate.” The order further provided that the Board *may* permit the parties to supplement the existing record with respect to “these issues of quantification”. Discretion to allow or not to allow for the record to be supplemented is incompatible with the notion of a *de novo* review. Fifth, the burden of proof as contended by CAB was misstated; in fact, the statement on which CAB had relied to state its proposition is to the opposite effect.

Here, common sense dictated that the application be granted. The 2003-2007 rates will not be the 2002 rates. SOCAN’s rate base will change. Rates will increase on three accounts; the only thing that remains to be decided is by how much. What CAB asked is to revert to rates that were known to be too low, thereby depriving the collectives of moneys they were known to be entitled. Finally, having the broadcasters continue to pay, on an interim basis, what they were required to pay until the tariff had been set aside was less disruptive to all participants than relying on the 2002 rates.

In the result, the Board reinstated the *SOCAN-NRCC Commercial Radio Tariff, 2003-2007* as an interim tariff but allowed radio stations to stop making catch up payments that, once a final decision is made, may become unnecessary or reduced.

Decision rendered November 30, 2006 – Application filed by Standard Radio Inc. for a ruling re: the *Regulations Defining Advertising Revenues*

Until 2002, royalties that commercial radio stations pay to broadcast musical works were calculated as a percentage of “gross income” as defined in the relevant SOCAN tariff. In 1998, the stations also began paying royalties to broadcast the sound recordings on which musical works are embedded (the so-called “neighbouring rights” of performers and record labels). These royalties, paid to NRCC, are calculated as a percentage of “advertising revenues” as defined in the *Regulations Defining Advertising Revenues*.

On October 14, 2005 the Board certified the *SOCAN-NRCC Commercial Radio Tariff 2003-2007*. That tariff provides that royalties payable to both SOCAN and NRCC are now to be calculated using “advertising revenues”.

Standard Radio Inc. (Standard) operates radio stations. These stations sell advertising under two types of contractual arrangements. Advertisers that purchase air-time through an accredited agency or produce their advertisements in-house receive a discount of 15 per cent from the normal advertising rates. Standard also offers a turnkey contract for advertisers who ask the station to produce their commercials; those advertisers pay the full advertising rate.

Standard argues that the definition of “advertising revenues” in the *Regulations* allows it to exclude the fair market value of the production services provided pursuant to turnkey contracts from the rate base. In 2005, this would have removed between \$6.8 and \$10.7 million from the rate base. SOCAN and NRCC disagree. This created a dilemma for Standard. If it stopped paying royalties on the value of its production services and its interpretation of the *Regulations* was wrong, it would be liable for statutory damages of between three and ten times the amount of applicable royalties.




On July 13, 2006, Standard asked the Board to rule on the issue. The Board asked the two concerned collectives, SOCAN and NRCC, as well as the Canadian Association of Broadcasters (CAB), to comment on Standard's application. SOCAN and NRCC, relying on an earlier decision of the Board (Decision of January 19, 2004 on the *Private Copying Enforcement*), argued that the Board did not have the power to issue the requested order, while the CAB supported Standard's arguments.

Subsection 66.7(1) of the *Copyright Act* provides that the Board has, "with respect to [...] matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record." Standard argued that this includes the power to issue the ruling it requested, since, according to Standard, the interpretation of Board regulations is itself central to the performance of the Board's mandate.


The Board only has such powers as are expressly granted to it by statute or impliedly necessary to the proper exercise of its core competence. Its core mandate is to certify and vary tariffs and to make and amend regulations. It does not include a standalone power to interpret those regulations. The resolution of disputes between parties concerning the interpretation of regulations is not such an exercise nor is it ancillary to such an exercise. Thus the Board concluded that it did not have the power to grant the relief Standard requested.

The ruling did not leave Standard without remedies. It could ask the Board to vary the tariff or to amend the *Regulations* or ask for a declaratory judgment from an ordinary court of law. As the Board determined that it did not have the power to issue the ruling that Standard asked for, there was no need to rule on the other issues raised by the parties.

In concurring reasons, Vice-Chairman Callary stated that while he agreed that the Board did not have the power to issue the requested ruling, he should nonetheless comment on the request. In his opinion, the fair market value of production services can be deducted from revenues obtained from turnkey contracts. This interpretation follows from an ordinary reading of the section, from the Regulatory Impact Analysis Statement published with the *Regulations*, from a balance with the treatment of production costs of third parties and from advertising revenues, not production revenues, being best suited for meeting the Board's intent to harmonize rate bases.



*The Board only has such powers
as are expressly granted to it
by statute or impliedly necessary
to the proper exercise of its
core competence.*



**The Board sets the royalties
and allocates them among the
collective societies...**



• Retransmission of Distant Signals •

Background

The *Act* provides for royalties to be paid by cable companies and others for the retransmission of distant television and radio signals. The Board sets the royalties and allocates them among the collective societies representing copyright owners whose works are retransmitted.

Hearings

No hearing was held in 2006-2007.

File Status

In February 2006, the parties filed agreements they had reached with respect to the radio and television retransmission tariffs for 2004 to 2008 as well as draft tariffs reflecting the agreements. The parties asked that the Board certify tariffs that reflected the agreements.

Only the allocation of royalties among collectives for the television tariff remained to be determined. In December 2006, the Board inquired about the status of the remaining issues and asked the parties to file a proposed timetable to deal with them. In January 2007, the Board was advised that all the collectives, except FWS Joint Sports Claimants (FWS) and Direct Response Television Collective (DRTVC), agreed to continue the allocation of royalties among themselves on the same basis as the *Television Retransmission Tariff 2001-2003*.

FWS wished that its allocation for 2004-2008 reflect any change in its viewing share and undertook to measure those changes using BBM viewing data. DRTVC wished to take its share entirely from what would otherwise be allocated to the Copyright Collective of Canada, in an amount or proportion to be determined as between the two collectives after conducting a meter-based viewing study. As of March 31, 2007, these issues remained pending.



• Educational Rights •

Background

Sections 29.6, 29.7 and 29.9 of the *Act* came into force on January 1, 1999. Since then, educational institutions and persons acting under their authority can, without the copyright owner's authorization, copy programs when they are communicated to the public and perform the copy before an audience consisting primarily of students. In a nutshell, institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff. Institutions can also copy other programs and subject-matters, and keep the copy for assessment purposes for thirty days; if they keep the copy any longer, or if they perform the copy at any time, the institution must then pay the royalties and comply with the conditions set by the Board in a tariff.

Filing of Tariff Proposal

In March 2006, the Educational Rights Collective of Canada (ERCC) filed a statement of proposed royalties to be collected from educational institutions for the reproduction and performance of works or other subject-matters communicated to the public by telecommunication for the years 2007 to 2011. No one objected to the statement, which is essentially identical to the tariff certified for the years 2003 to 2006.

Hearings

No hearing was held in 2006-2007.

Decision

On February 16, 2007, the Board certified the tariff as proposed for the years 2007 to 2011. Institutions can operate under a transactional or comprehensive formula. For preschool to secondary students, the transactional tariff is 13¢ per minute for copies made from a radio signal and \$1.60 per minute for copies made from a television; the comprehensive tariff is \$1.73 per calendar year per full-time equivalent. For other students, the rates are 17¢, \$2.00 and \$1.89 respectively.





• Private Copying •

Background

The private copying regime entitles an individual to make copies (a “private copy”) of sound recordings of musical works for that person’s personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid. Royalties are paid to the Canadian Private Copying Collective (CPCC) for the benefit of eligible authors, performers and producers.

The regime is universal. All importers and manufacturers pay the levy. However, since these media are not exclusively used to copy music, the levy is reduced to reflect non-music recording uses of media.

Hearings

One hearing was held in 2006-2007.

Decision

Interim decision rendered on December 14, 2006

Hearings dealing with the proposed tariffs of the Canadian Private Copying Collective for 2005, 2006 and 2007 were held on October 24, 2006. The matter was still under advisement at the end of 2006. The collective asked that the Board issue for 2007 an interim decision that would be identical to that of December 21, 2005. The Board granted the application. The interim tariff reflected the provisions of the tariff certified for 2003 and 2004. Rates were set at 29¢ for each audio cassette of 40 minutes or more in length, 21¢ for each CD-R or CD-RW and 77¢ for each CD-R Audio, CD-RW Audio or MiniDisc.

*The regime
is universal.*





• General Regime •

Background

Sections 70.12 to 70.191 of the *Act* give collective societies that are not subject to a specific regime the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes. The certified tariff is enforceable against all users; however, in contrast to the specific regimes, agreements signed pursuant to the general regime take precedence over the tariff.

Filing of Tariff Proposals

In 2006-2007, five tariff proposals were filed in accordance with section 70.13 of the *Act*. Three of them were filed by CMRRA/SODRAC Inc. (CSI) for the reproduction of musical works by commercial radio stations for the years 2008-2012, by online music services for the year 2008 and by multi-channel subscription radio services for the years 2008-2009. The Canadian Musical Reproduction Rights Agency (CMRRA) filed its Tariff No. 3 for the reproduction of musical works by non-commercial radio stations for the year 2008. Finally, the Audio-Video Licensing Agency (AVLA) and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ) jointly filed a tariff proposal for the reproduction of sound recordings by commercial radio stations for the years 2008-2011.

Hearings

One hearing was held in 2006-2007 dealing with CSI's tariff for the reproduction of musical works by online music services for the years 2005-2007. The hearing was held in September 2006 and lasted 10 days.

Decisions

In 2006-2007, the Board rendered the following two decisions.

Decision rendered February 16, 2007 – CSI's Tariff for the reproduction of musical works by commercial radio stations (2007)

CSI's proposed tariff for the reproduction of musical works by commercial radio stations in 2007 was essentially the same as the tariff certified by the Board for 2006. CSI asked however that royalties for the first two months of operation of a new station be calculated using the income for those months and not the "reference month", defined as the second month before the month for which royalties are being paid. The purpose of the change probably was to prevent a station from obtaining a free licence for its first two months of operation, given that a station does not earn advertising revenues until it starts broadcasting.

The Canadian Association of Broadcasters objected to the proposed change. Shortly after, CSI abandoned its request for a change and the association withdrew its objection. The Board therefore certified for 2007 a tariff identical to the 2006 tariff. Stations where works from the repertoire account for less than 20 per cent of their broadcasting



time or that neither make nor keep hard drive copies pay 0.12 per cent on the first \$625,000 of gross annual income, 0.23 per cent on the second \$625,000, and 0.35 per cent on the rest. The rates applicable to other stations are 0.27 per cent, 0.53 per cent and 0.8 per cent respectively. This is expected to generate royalties of approximately \$8 million in 2007.

The Board noted once more the need to harmonize the rate bases for the royalties that commercial radio stations pay SOCAN, NRCC and CSI. This is a matter that should be disposed of through a hearing. The three tariffs will expire at the same time; the issue can be addressed when the tariffs for 2008 are examined.

Decision rendered March 16, 2007 – CSI’s Tariff for the reproduction of musical works by online music services (2005-2007)

On March 31, 2004, CSI filed a statement of the royalties it proposed to collect for the reproduction, in Canada, by online music services in 2005, 2006 and 2007, of musical works in the combined repertoire of the Canadian Musical Reproduction Rights Agency (CMRRA) on the one hand, and the *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* and SODRAC 2003 Inc. (SODRAC) on the other.

CSI asked for the greater of 7.5 per cent of gross revenue or 75¢ per month per subscriber for services that only offer on-demand streams; the greater of 10 per cent of gross revenue or one dollar per month per subscriber for services that offer limited downloads, with or without on-demand streams; and the greater of 15 per cent of gross revenue or 10¢ per permanent download of a single musical work.

CSI contended that the offering of music on line was increasing the value of its repertoire and that rights holders were entitled to a share in the value of this new economic activity. The right to reproduce musical works and to authorize subscribers to make their own copies is essential to online services. That ability to make additional copies gives services a competitive edge and provides added value to consumers. Rights holders should benefit from that added value. CSI also proposed that the licences be issued only to online services and opposed the possibility of allowing record labels to obtain a licence from CSI and then sub-licence the use of CSI’s repertoire by those services.

Apple Canada Inc., Napster LLC, Bell Canada, the Canadian Association of Broadcasters, the Canadian Broadcasting Corporation, the Canadian Cable Telecommunications Association, the Canadian Recording Industry Association, CHUM Ltd., EMI Music Canada, Archambault Group Inc., Moontaxi Media Inc., MusicNet Inc., RealNetworks Inc., Sirius Canada, Sony BMG Music Canada, TELUS, Universal Music Canada, Warner Music Canada (Warner) and Yahoo! Canada filed timely objections.

The objectors proposed royalties of 5.3 per cent for permanent downloads, 3.5 per cent for limited downloads and 0.5 per cent for on-demand streaming. They asked that the rate base be what subscribers paid, not gross income. They proposed minimum rates of 3.85¢ for permanent downloads; of 21¢ per month per subscriber for services that allow limited downloads and on-demand streaming if a service did not authorize reproductions onto portable devices and 33¢ if it did. They proposed either that no minimum be applied to downloads of albums or that the minimum price be reduced so as to avoid excessive royalties in the case of albums containing a large number of tracks. Finally, they sought the right for record labels to be allowed to apply for the licence so as to then sub-licence the right to reproduce the musical work to online services.



Permanent Downloads

The Board concluded that the price for permanent downloads needed to be determined using the price currently paid to reproduce a musical work onto a prerecorded CD, or 7.7¢ per track. The Board accounted for the SODRAC-ADISQ agreement at 8.9¢ per track, leading to an adjusted rate of 7.8¢.

The average price of a downloaded individual track is 99¢. However, iTunes sells most of its albums for \$9.99. Since the average number of tracks on a downloaded album is 13, the average price per track on an album is 77¢. The weighted average price of a track, single or as part of an album, is thus 89¢. The royalty of 7.8¢, expressed as a percentage of this average price of 89¢, results in a rate of 8.8 per cent. It is this rate, subject to a further discount explained later, that the Board certified. The minimum fee per track was set at 5.9¢ per individual track and 4.5¢ per track included in a bundle.

Limited Downloads

The Board adopted the position agreed upon by the parties, to the effect that the rate for limited downloads should be two-thirds of the rate for permanent downloads. The Board thus certified a rate of 5.9 per cent, but expressed concerns with the possibility that this approach may lead to some level of double discounting, because of the already lower average price per track for limited downloads. The minimum fees certified by the Board are 57.0¢ and 37.4¢ per month respectively, whether further reproduction on a portable device is allowed or not.

On-Demand Streaming

Even though no such on-demand streaming service existed at the time CSI proposed its tariff, the Board nevertheless certified a tariff for this category since it targets a possible, protected use of its repertoire.

CSI asked that the rate for on-demand streaming be set somewhere between the rate set for limited downloads and the rate pay audio services (Galaxie and Max Trax) have agreed to pay to CSI. The Board adopted CSI's methodology and certified a rate of 4.6 per cent with a minimum fee of 29.2¢.

Base Rate

The Board adopted the position of the objectors to base royalties on what consumers pay rather than on all revenues including advertisement. The Board noted that online music services do not earn much more than what consumers pay and that it did not know to what extent the other revenues were attributable to the use of CSI's repertoire.



The Role of Record Labels

In the past, the Board stated that generally speaking, a tariff should target uses, not users. The *Act*, not the Board, determines who is liable to pay for a protected use. The Board also stated that generally speaking, a tariff should target both the right to do and the right to authorize. When administered collectively, the right to authorize an act is subject to the same regime as the act itself. Furthermore, the authorization right, though separate, co-exists with the right to do.

The Board does not consider that proscribing record labels from availing themselves of this tariff contradicts either proposition. Had it not been convinced that it was able to expressly prevent record labels to avail themselves of the tariff, the Board mentioned it would have designed the administrative provisions so as to ensure that CSI would not be obliged to deal with multiple reporting channels.

Ability to Pay

The Board phases in this new tariff by applying a discount of 10 per cent. This discount is the same the Board granted when it first certified the Pay Audio Services Tariff. This discount is intended to apply only for the life of this tariff.

***The Act, not the Board,
determines who is liable to pay
for a protected use.***



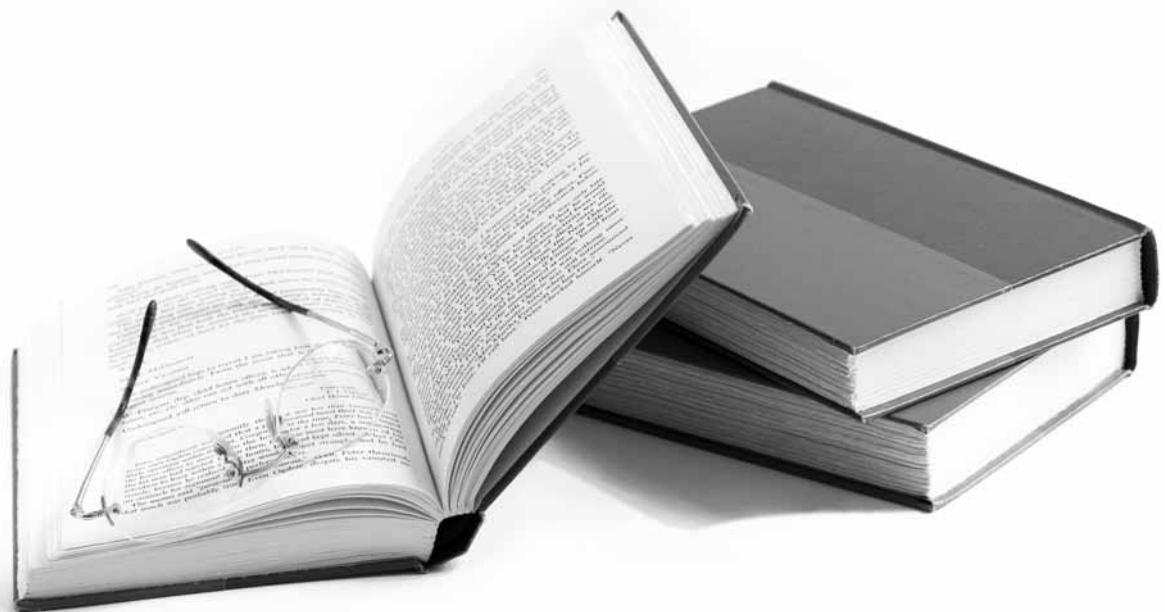


• Arbitration Proceedings •

Pursuant to section 70.2 of the *Act*, on application of the society or the user, the Board can set the royalties and other terms of a licence for the use of the repertoire of a collective society subject to section 70.1, when the society and a user are unable to agree on the terms of the licence.

In July 2005, MusiSélect inc. had filed such an application asking the Board to fix the terms and conditions of a licence for the reproduction of sound recordings in the repertoire of the Audio-Video Licensing Agency (AVLA). On May 18, 2006, MusiSélect informed the Board that an agreement had been reached with AVLA. In compliance with subsection 70.3(1) of the *Act*, the Board did not proceed with the application.

*...the Board can set the royalties
and other terms of a licence [...]
when the society and a user
are unable to agree...*









• Unlocatable Copyright Owners •

Pursuant to section 77 of the *Act*, the Board may grant licences authorizing the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owner is unlocatable. However, the *Act* requires licence applicants to make reasonable efforts to find the copyright owner. Licences granted by the Board are non-exclusive and valid only in Canada.

In 2006-2007, 43 applications were filed with the Board and 21 licences issued as follows:

- *Nancy DeVillers*, Ottawa, Ontario, for the reproduction of architectural plans created in October 1989 by Anderson and Associates of Toronto for the property located at 124 Duford Street in Ottawa.
- *CLV Group Inc.*, Ottawa, Ontario, for the reproduction of plans created in March 1962 by M.W. Kosub Ltd., and in July 1968 by Braig, Frigon, Hanley, Brett & Minty, for the property located at 2090 and 2116 Neepawa and 217 Lockhart (The Saville Apartments) in Ottawa.
- *CLV Group Inc.*, Ottawa, Ontario, for the reproduction of various plans created in 1991 by CDC for the property located at 50 MacLaren Street in Ottawa, and plans created in 1993 for the property located at 143 MacLaren Street in Ottawa.
- *Peter Ebsen*, Ottawa, Ontario, for the reproduction of architectural plans created in 1973 by Mayers, Girvan, Wellen & Bern of Montreal, for the property located at 130 Robertson Road in Ottawa.
- *The University of Alberta Press*, Edmonton, Alberta, for the reproduction of an article written by Irene Todd Baird published in the *Saturday Night* magazine, May 17, 1924.
- *Onali Noorbhai*, Ottawa, Ontario, for the reproduction of architectural plans created in 1981 by L. Sigouin for the property located at 1319 Plante Drive in Ottawa.
- *Art Gallery of Alberta*, Edmonton, Alberta, for the reproduction of five drawings by Sidney Clarke Ells in a book.
- *Daniel G. Arnold*, Ottawa, Ontario, for the reproduction of two quotes from an article written by Richard Brandon Morris published in the *Saturday Review* magazine, December 18, 1965.
- *André Breault*, Ottawa, Ontario, for the reproduction of architectural plans created in 1974 (draftsperson unknown) for the property located at 499 Lyon Street in Ottawa.
- *Dr. Graham Carr*, Montreal, Quebec, for the reproduction of literary and artistic works re: Glenn Gould.
- *Norman Bryon*, Ottawa, Ontario, for the reproduction of architectural plans created in 1988 (draftsperson unknown), for the property located at 558 Fielding Drive in Ottawa.
- *Karen Kravchenko*, Ottawa, Ontario, for the reproduction of architectural plans created in 1993 by Konark Designs Inc. for the property located at 27 Grenadier Way in Ottawa.
- *Infinite Design Studio*, Ottawa, Ontario, for the reproduction of architectural plans created in 1957 by Burgess & McLean Architects for the property located at 273 Donald Street in Ottawa.



- *Robert Taylor Architects Inc.*, Ottawa, Ontario, for the reproduction of architectural plans created in 1961 (draftsperson unknown), for the property located at 2199 Carling Avenue in Ottawa.
- *ServiceMaster of Ottawa*, Ottawa, Ontario, for the reproduction of various plans created by Rycliffe Homes Inc. in 1996-1997, for the property located at 2 Royal Field Crescent in Ottawa.
- *Paul Muirhead*, Ottawa, Ontario, for the reproduction of architectural plans created in 1992 (draftsperson unknown), for the property located at 6223 Deermeadow Drive in Ottawa.
- *Natasha Kurdyla*, Ottawa, Ontario, for the reproduction of architectural plans created in 1964-1965 by Trendsetter Developments Limited for the property located at 12 Banner Road in Ottawa.
- *Patricia E. Roy*, Victoria, B.C., for the reproduction of seven different cartoons in a monograph.
- *Mireille Brunet*, Ottawa, Ontario, for the reproduction of architectural plans created in 1993 by Wedgewood Builders for the property located at 64 Scarlet Court in Ottawa.
- *Chris Fleming*, Ottawa, Ontario, for the reproduction of architectural plans created in 1986 by Building Masters Inc. for the property located at 20 Fifeshire Crescent in Ottawa.
- *Chelsea Books*, Chelsea, Quebec, for the reprint of the book "Waste Heritage" written by Irene Todd Baird.



*Pursuant to section 77
of the Act, the Board
may grant licences
authorizing the use of
published works...*





• Court Decisions •

RE: SOCAN-NRCC Tariffs 1.A (Commercial Radio Stations) 2003-2007

On October 14, 2005, the Board certified the *SOCAN-NRCC Commercial Radio Tariff, 2003-2007*. That tariff significantly increased the royalties that commercial radio stations pay to broadcast musical works and sound recordings. The Canadian Association of Broadcasters (CAB) applied for judicial review of that decision on two grounds: failure of the Board to consider an objection by CAB to the tariffs proposed by the collectives and inadequacies in the Board's reasons.

CAB first argued that the Board had failed to take into account its objection that there had been a proliferation in the number of rights holders to be compensated. This increased financial burden, CAB argued, should be recognized by the Board. The Federal Court of Appeal found that it was implicit in the Board's finding, on the basis of evidence of rising revenues, the industry could afford to pay increased royalties. The Board had also referred to the combined rates payable to all three collectives in a footnote to its reasons. Thus the court concluded that the Board had not erred in law by failing to address a relevant factor which it was statutorily bound to consider.

On the other hand, CAB succeeded with its second argument. The Court found that the Board did not give adequate reasons for its finding that a historical undervaluation warranted an increase of 10 per cent while increased efficiencies in the use of music warranted an increase of 7.5 per cent.

The difficulty laid with the Board's explanation of its choice of relevant amounts. For example, concerning the historical undervaluation of music, the Board simply stated that "based on the evidence taken as a whole", the undervaluation "is important and lies in an interval of between 10 and 15 per cent." It went on to say that, since "the evidence is not more precise," the Board chooses "to be careful" and values the underestimation at "about 10 per cent". In the circumstances of the case, it was not enough to justify quantifications by merely referring to the evidence taken as a whole. It was not enough to say in effect: "We are the experts. This is the figure: trust us." The Board's reasons served neither to facilitate a meaningful judicial review, nor to provide future guidance for regulatees.

The Court did recognize that the difficulty in this respect seemed to have stemmed in part from the failure of CAB to put in evidence showing, for example, the relative rates of return earned by radio stations which made a significant use of music and those which did not. Still, it was the Board's responsibility to ask the parties to provide the evidence required to quantify an amount and if none was forthcoming, to explain how it made its best efforts to estimate an appropriate rate increase. Furthermore, the Board is not bound to quantify each of the components that justify an increase, but may simply choose to explain the reasoning supporting its quantification of the global royalty rate increase.

As a result, the Court set aside the Board's decision and remitted the matter to the Board to re-determine the issues in respect of which the reasons were found to be inadequate.

Reference: *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* [2006 FCA 337]



RE: CSI – Online Music Services Tariff (2005-2007)

The Canadian Recording Industry Association (CRIA) objected to the tariff that CSI proposed to collect for the reproduction of musical works by online music services for the years 2005 to 2007. Originally, the objection was filed on behalf of CRIA and all its Class A (major labels) and B (independent labels) members. CRIA eventually advised the Board that it no longer intended to represent its Class B members in the proceedings. The Board then ordered CRIA to send a notice to Class B members informing them that it would not be representing their interests in the proceeding before the Board and that this was CRIA's decision, not the Board's.

CRIA filed an application for judicial review with the Federal Court of Appeal, challenging the validity of this order on three grounds. First, the order breached the Board's duty of fairness because it had been issued without giving CRIA prior notice and an opportunity to make submissions. Second, the Board did not have the power to issue the order. Third, if the Board has the power to make the order, it had exercised its power unreasonably.

The Court dismissed the application. The Board had discharged any duty of fairness owed when, at the request of CRIA, it considered CRIA's submissions before confirming the original order. Section 66.71 of the *Copyright Act* provides that the Board "may at any time cause to be distributed or published, in any manner and on any terms and conditions that it sees fit, any notice that it sees fit to be distributed or published." That language authorizes the kind of order made by the Board. Finally, it was reasonable for the Board to seek to assure itself that the Class B members were made aware of CRIA's decision and its implications.

Reference: *Canadian Recording Industry Association v. Canada (Attorney General)* [2006 FCA 336]



Agreements Filed with • the Board •

Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licences for the use of a society's repertoire. Filing an agreement with the Board pursuant to section 70.5 of the *Act* within 15 days of its conclusion, shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision also grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties payable under the agreement, as well as the related terms and conditions.

In 2006-2007, 93 agreements were filed with the Board.

Access Copyright, The Canadian Copyright Licensing Agency, which licenses reproduction rights such as digital licensing and photocopy rights, on behalf of writers, publishers and other creators, filed 61 agreements granting various educational institutions, language schools, non-profit associations and copy shops a licence to photocopy works in its repertoire.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 19 agreements. COPIBEC is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with Access Copyright) and foreign rights holders. The agreements filed in 2006-2007 have been concluded with various organisations, municipalities as well as *Bibliothèque et archives nationales du Québec*.

The Audio-Video Licensing Agency (AVLA), which is a copyright collective that administers the copyright for owners of master and music video recordings, filed 6 agreements.

The Canadian Musical Reproduction Rights Agency (CMRRA), a Canadian centralized licensing and collecting agency for the reproduction rights of musical works in Canada, has filed for its part four agreements it concluded with Warner Music Canada, EMI Music Canada, SONY BMG Canada and Universal Music Canada.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed three agreements it entered into with regard to media monitoring by non-commercial services, namely the Government of Alberta, the Government of British Columbia and the Government of Ontario. CBRA represents various Canadian private broadcasters who create and own radio and television news and current affairs programs and communication signals.